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SUPREME COURT OF THE UNITED STATES

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No. 81-5324

UNITED STATES OF AMERICA ex rel. THOMAS RILEY,

Petitioner,

vs.

GAYLE FRANZEN, Director, Illinois Department of Corrections, and LOU V. BREWER, Warden, Stateville Correctional Center,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, SEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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I.

BY REQUESTING TO SPEAK TO HIS FATHER DURING CUSTODIAL INTERROGATION, AS A MEANS OF OBTAINING THE SERVICES OF AN ATTORNEY, THOMAS RILEY, A 16 YEAR OLD JUVENILE, INVOKED HIS RIGHT TO COUNSEL AND SILENCE UNDER THE FIFTH AMENDMENT. THE BLATANT REFUSAL BY THE POLICE TO PERMIT THOMAS RILEY TO SPEAK TO HIS FATHER WHO WAS PRESENT IN THE POLICE STATION VITIATES HIS CONFESSION.

Respondents' arguments to the contrary notwithstanding, Fare v. Michael C., 442 U.S. 707 (1979), has not foreclosed petitioner's claim. (See petition, pp. 8-14). The issue is ripe for review because this area of the law is unsettled. For example, in Prysock v. California, ____ U.S. ____, 29 Cr. L. 4110 (1981), a per curiam opinion of the Court reflects the attitude of the Court that parental presence during a custodial interrogation of a juvenile does serve a useful purpose. Randall Prysock, a minor, had been arrested for murder. The police advised him of his constitutional rights and then notified his parents of his arrest. They arrived at the Sheriff's office and spoke to their son. In their presence, Randall was again advised of his rights. At one point Mrs. Prysock interrupted the officer to clarify her understanding of her son's right to counsel: "According to Sgt. Byrd, Mrs. Prysock asked if respondent could still have an attorney at a later time if he gave a statement now without one." Prysock, 29 Cr. L. at 4111. The officer assured her that Randall "would have an attorney when he went to court and that 'he could have one at this time if he wished one.'" Prysock, 29 Cr. L. at 4111. The officer also ascertained from the parents that they did not intend to hire an attorney for Randall. Prysock, 29 Cr. L. at 4111, footnote 1. It was only after hearing the officer's explanation of his right to counsel and learning from his parents that they did not intend to hire an attorney for him that Randall stated he wished to talk to the police. Prysock, 29 Cr. L. at 4111, footnote 1. See also the views of Justices Stevens, Brennan and Marshall, dissenting. Prysock, 29 Cr. L. at 4112. The import of Prysock is that parental presence serves to clarify a juvenile's understanding of his rights and to inform the juvenile whether or not they as

parents intend to engage an attorney for him. Unlike Randall Prysock, Thomas Riley was prevented by the police from speaking to his father about his rights and of learning what the father intended to do for him. The record is clear that Ernest Riley, Sr., had intended to obtain counsel for his son. (Appendix C to the Petition, page 5, #23). But Thomas did not know it prior to confessing.

Regardless of what the father's intent was in seeking to see Thomas, the focus of the analysis here, contrary to what Respondents urge, is that Thomas asked to see his father. What is important here is Thomas' perception of his rights as manifested by his request to see his father. Rhode Island v. Innis, 446 U.S. 291, 301 (1980).

Thomas wanted to see his father about two matters. First, he wanted his father to secure counsel for him. (Riley, Transcript, page 38, and Abstract, page 48). Secondly he wanted to clarify for himself through his father what his brother had said to him about leniency he would receive as a juvenile for taking the "weight" for himself and his brother. (Riley, Transcript, p. 38,61). He should have had that opportunity.

Respondents are wrong in stating that Thomas was independent of his father. It is true that Thomas was living with his brother. But it was the father who had given Thomas and his brother money to pay for food and rent. (Riley, Transcript, page 43).

Respondents' attempt to minimize the impact of the legal authorities relied on by the petitioner. Their analysis of the law is faulty and adds nothing to their position.

GEORGIA:

In Riley v. State, 237 Ga. 124, 226 S.E.2d 922, 925-926 (1976), the Georgia Supreme Court distinguished Freeman v. Wilcox, 119 Ga. App. 325, 167 S.E.2d 163 (1969) for obvious reasons: the mother was present when the juvenile was admonished of his rights. That the mother was not separately advised of her son's rights is constitutionally sound, and to the extent that Freeman required such an admonition, the Court was correct in disapproving such added procedure. The Georgia court did however follow the criteria established in West v. United States, 399 F.2d 467 (5th Cir.,

1968). Among those factors the Court looked to whether the juvenile was allowed to consult with relatives or friends. West, 399 F.2d at 469.

NEW JERSEY:

State v. R.W., 115 N.J. Super. 286, 279 A.2d 709 (1971), aff'd. per curiam, 61 N.J. 118, 293 A.2d 186 (1972), is easily distinguishable because there the juvenile gave a fictitious name and a false address and the police were not able to reach the parents. R.W., 279 A.2d at 717.

Respondents refer to State in the Interest of S.H., 61 N.J. 108, 293 A.2d 181 (1972). The New Jersey Supreme Court in that case reaffirmed the standards previously articulated in In re Carlo, 48 N.J. 224, 225 A.2d 110 (1966), and determined that the juvenile's confession was involuntary where the police excluded the father during the custodial interrogation in a "cavalier" manner "when his boy most needed him . . ." S.H., 293 A.2d at 185.

State in Interest of A.B.M., 125 N.J. Super. 162, 309 A.2d 619 (1973), supports Riley's position here. There the mother of the juvenile was brought to the interrogation room. She first heard her son's oral admission and permitted her son to give a written statement. She then withdrew her permission, requested an attorney for her son and the interrogation terminated. A.B.M., 309 A.2d at 621.

MASSACHUSETTS:

In Commonwealth v. Cain, 279 N.E.2d 706 (Mass., 1972), the father was denied access to his son. Respondents fail to state what the Court said in its entirety:

> "At least in the present circumstances, we think that this frightened and confused fifteen year old defendant, who was being held in the basement of the police station, should have been permitted the opportunity to consult his father who was upstairs in the station and had requested to see his son. The Miranda warning that the boy had a right to consult a lawyer was hollow indeed when he was denied access to his father who, practically speaking, was the only avenue through which he could effectively evaluate and, if he wished, exercise the right to counsel. (emphasis added) See Gallegos v. Colorado, 370 U.S. 49, 54, 82 S.Ct. 1209, 8 L.Ed.2d 325 (adult advice may be necessary to put juvenile defendant on more equal footing with police); In re State in the Interest of Carlo, 48 N.J. 224, 240-241, 225 A.2d 110 (boys of thirteen and fifteen lack judgment to appreciate harm to themselves by yielding to insistent police questioning). See also Matter of Nelson, 58 Misc.2d 748, 750-751, 296 N.Y.S.2d 472 (Family Ct., Bronx County, N.Y.); Story v. State,

> 452 P.2d 822, 824-825 (Okl.Cr.Ct.App.). Compare Lopez v. United States, 399 F.2d 865, 867 (9th Cir.) (waiver held effective in case involving sixteen year old defendant where mother was present and consented to the interrogation)."

Cain, 279 N.E.2d at 710, footnote 3.

MARYLAND:

Respondents misstate the holding of the Maryland Court of Appeals in Walker v. State, 12 Md. App. 684, 280 A.2d 260 (1971). There the 16 year year old youth was prevented from talking to his mother and other relatives by telephone. The court stated:

> "The major factor, however, though intertwined inexorably with the others, is the fact that this juvenile, regardless of how heinous were the offenses with which he was charged, was held incommunicado until after his confession was obtained."

Walker, 280 A.2d at 273.

The Walker court reached its decision in light of this Court's pronouncements in Haley v. Ohio, 332 U.S. 596 (1948). Walker, 280 A.2d at 273-274.

LOUISIANA:

In In re Dino, 359 So.2d 586 (La., 1978), the Louisiana Supreme Court articulated its standards in light of federal constitutional requirements which were derived from this Court's opinion in Miranda v. Arizona, 384 U.S. 436 (1966), and from its state constitution "whose framers intended to adopt the Miranda edicts full-blown and unfettered." Dino, 359 So.2d at 590.

CALIFORNIA:

Respondents misstate the holding of the California court in In re Patrick W., 104 Cal. App.3d 615, 163 Cal. Rptr. 848 (1980). The court held that grandparents who had sought to speak to the juvenile charged with his father's murder "did not have the official ambivalence that the Supreme Court saw in the Michael C. case. They fall more in the group of which our Supreme Court said, in P. v. Burton (1971) 6 Cal.3d 375, at page 382, 99 Cal. Rptr. 1, at page 5, 491 P.2d 793, at page 797, 'person to whom he [a minor] normally looks' for help." Patrick W., 163 Cal. Rptr. at 849.

PENNSYLVANIA:

Petitioner disagrees with Respondents' analysis of that state's requirements. In reaffirming Commonwealth v. Roane, 459 Pa. 389, 329 A.2d 286 (1974), the Supreme Court of Pennsylvania recently stated:

> "the impediment of [juvenile] immaturity can only be overcome where the record establishes that the youth had access to the advice of an attorney, parent, or other interested adult and that the consulted adult was informed as to the constitutional rights available to the minor and aware of the consequences that might follow the election to be made."

Commonwealth v. Smith, 372 A.2d 797, 800 (Pa., 1977)

SUMMARY:

In reviewing the trend in the development of the law, the Louisiana Supreme Court acknowledged that a majority of the States permit juveniles to waive their rights without the guidance of a friendly adult, however "a growing number of courts and scholars recognize that a more ascertainable assurance of a knowing and intelligent waiver of constitutional rights should precede juvenile interrogation." (citations omitted). State in Interest of Dino, 359 So.2d 586, 593 (La., 1978).

II.

MEASURED BY THE TOTALITY OF THE CIRCUMSTANCES TEST NEITHER THOMAS RILEY'S CONFESSION NOR HIS WAIVER OF RIGHTS IS VOLUNTARY.

Since respondents refuse to discuss the shocking facts of this case, no response is needed.

III.

THE DENIAL OF CERTIORARI WHICH WAS DIRECTED TO THE ILLINOIS APPELLATE COURT ON DIRECT APPEAL SHOULD NOT SERVE TO BAR THIS PETITION WHICH IS DIRECTED TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT IN HABEAS CORPUS PROCEEDINGS.

Respondents urge the adoption of a new rule which would bar certiorari jurisdiction in habeas corpus litigation. Their argument is without merit and should be rejected as it was by a majority of the Court in Brown v. Allen, 344 U.S. 443, 489-497, 73 S.Ct. 397, 97 L.Ed. 469 (1953) (Opinion of Frankfurter, J.).

In a post Brown memorandum opinion Justice Frankfurter stated:

> "Although the Court has definitely decided that a denial of a petition for certiorari carries no legal significance, Brown v. Allen, 344 U.S. 443, 489-497, 97 L ed 469, 489-510, 73 S Ct 397, the bar, in briefs, and lower courts, in their opinions, continue to note such denials by way of reinforcing the authority of cited lower court decisions. It has therefore seemed to me appropriate from time to time to emphasize through concrete illustrations that a denial of certiorari does not imply approval of the decision for which review is sought or of its supporting opinion."

Elgin, Joliet & Eastern Railway Co. v. Clairon Vern Gibson, 355 U.S. 897, 78 S.Ct. 270, 2 L.Ed.2d 193 (1957).

Respondents further suggest that certiorari jurisdiction should be restricted here because Justice Marshall's prior opinion in this case had advanced petitioner's claim and "it simply cannot logically be claimed that the other judges of the Court were not aware of these issues." (Respondents' Brief, p. 19). This contention also lacks merit.

> "That one of us undertook to write a dissent, even a 'pointed dissent,' from the denial of certiorari should suggest, again, nothing at all about the views of any other Members of the Court on the merits of the petition. Surely each of us has seen many cases in which a colleague's dissent from the denial of certiorari pointed to an issue of great concern that we thought should be decided by this Court, but in which we did not join because we did not consider the case to be an appropriate vehicle for determination of that issue."

United States v. Kras, 409 U.S. 434, 461, footnote 3, 93 S.Ct. 631, 34 L.Ed. 2d 626 (1973) (Marshall, J., dissenting).

CONCLUSION

WHEREFORE, Thomas Riley respectfully requests that a writ of certiorari issue to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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